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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-619

SAVE OUR CUMBERLAND MOUNTAINS, INC.;
J. W. BRADLEY, President,
Save Our Cumberland Mountains, Inc., ... Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY;
AUBREY WAGNER, Chairman,
Tennessee Valley Authority, ... Respondents.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Page

Citation To Opinion Below 1

Jurisdiction 2

Statutory Provisions Involved 2-3

Questions Presented 3-4

Statement of The Case 4-10

Reasons For Granting The Writ:

I. THE QUESTION WHETHER A FEDERAL AGENCY MAY BE ENJOINED FROM FOSTERING, THROUGH CONTRACTUAL ACTIVITY, THE FRUSTRATION OF SHARPLY DEFINED STATE LAW IS ONE OF NOVEL IMPORTANCE TO ALL FEDERAL AGENCIES AND TO OUR SYSTEM OF FEDERALISM 10-18

II. THE FAILURE OF THE LOWER COURTS TO CONSIDER PETITIONERS' CLAIM ARISING UNDER SECTION 102(2)(c) OF NEPA, WHICH WAS PLAINLY INCLUDED ON THE FACE OF THE COMPLAINT AND STATES A PRIMA FACIE CAUSE OF ACTION, CONSTITUTES A SERIOUS ABUSE OF DISCRETION WHICH THIS COURT SHOULD CORRECT. 18-20

Conclusion 20

Appendix:

Order of the United States Court of Appeals .. 1a

Order Denying Petition for Rehearing 2a

Order and Memorandum of the District Court 3a-5a

Complaint 6a-20a

TABLE OF AUTHORITIES

CASES: Page

Elkins v. *United States*,
364 U.S. 206 (1960) 16

Green v. *Connally*,
330 F. Supp. 1150 (D.D.C. 1971) 16

Hanly v. *Kleindienst*,
471 F.2d 823 (2d Cir. 1972) 19

Illinois v. *City of Milwaukee*,
406 U.S. 91 (1972) 12

National Coal Board v. *Gamble*,
42 Cr. App. R. 240 (Div. Ct. 1958) 14

National Licorice Co. v. *NLRB*,
309 U.S. 350 (1950) 13

Natural Resources Defense Council v. *TVA*,
5 ERC 1669 (E.D. Tenn. July 24, 1973) 20

Olmstead v. *United States*,
277 U.S. 438 (1928) 13

Samuels v. *Mackell*,
401 U.S. 66 (1971) 17

Save Our Ten Acres v. *Kreger*,
472 F.2d 463 (5th Cir. 1973) 19

Tank Truck Rentals, Inc. v. *Commissioner of Internal Revenue*, 356 U.S. 30 (1950) 14-15

Younger v. *Harris*,
401 U.S. 37 (1971) 10

STATUTORY PROVISIONS:

28 U.S.C. Sec. 1254(1) 2
28 U.S.C. Sec. 1331(a) 2, 11, 12, 13
28 U.S.C. Sec. 1361 ..... 2, 11
42 U.S.C. Sec. 4332(2) 2, 4, 18
Tenn. Code Ann. Sec. 59-1109 6
Tenn. Code Ann. Sec. 59-1112 ..... 6, 8

ADMINISTRATIVE REGULATIONS:

18 C.F.R. Sec. 300.735-1 et seq. 17

OTHER SOURCES:

C. Harvey, *The Economic Impact of Enforcing Weight Restrictions on Eastern Kentucky Roads* (monograph prepared by the Office of Development Services and Business Research, College of Business and Economics, University of Kentucky) 7

L. Jaffe, *Judicial Control of Administrative Action* (1965) 17

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TENNESSEE VALLEY AUTHORITY;
AUBREY WAGNER, Chairman,
Tennessee Valley Authority, ... Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 14, 1973.

CITATION TO OPINION BELOW

The decision of the Court of Appeals is included in the Appendix, *infra,* p. 1a. The Order of the District Court is set forth in the Appendix, *infra,* p. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1973. Petitioners' Petition For Rehearing was denied on July 11, 1973 (a copy of this Order is included in the Appendix, *infra*, p. 2a.) The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Sec. 1331(a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. Sec. 1361:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

42 U.S.C. Sec. 4332(2)(c):

> "[A]ll agencies of the Federal Government shall — include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of title 5, United States code, and shall accompany the proposal through the existing agency review processes;"

QUESTIONS PRESENTED

1. May a federal agency be enjoined on the basis of fundamental principles of federalism and federal-state comity from fulfilling obligations under contracts whose performance entails pervasive violations of state law?

2. Did TVA fail to comply with the procedural requirements of Sec. 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. Sec. 4332 (2)(c), by not preparing an adequate environmental impact statement considering the significant environmental consequences flowing from the transportation of coal to TVA facilities?

STATEMENT OF THE CASE

The petitioners, Save Our Cumberland Mountains, Inc., (hereinafter referred to as SOCM) and J.W. Bradley, President of SOCM, filed suit in the United States District Court for the Eastern District of Tennessee on September 25, 1973, against the Tennessee Valley Authority (hereinafter referred to as TVA), charging TVA with contravening standards of conduct for federal agencies grounded in federal law by accepting on the property of its Kingston Steam Plant substantial numbers of deliveries of coal from its contractors tendered in trucks operated in violation of the weight and dimensional limitations prescribed by Tennessee statutes. Detailing how the continuous operation of these overweight vehicles desecrated the roads upon which its members traveled, SOCM urged the Court to declare TVA's involvement in its contractors' activity to be in frustration of sharply defined state policy and to enjoin TVA from accepting further deliveries tendered unlawfully. The complaint also alleged that TVA was not complying with section 102 (2)(c) of the National Environmental Policy Act of

1969 (hereinafter referred to as NEPA), inasmuch as TVA had not filed an adequate environmental impact statement, in compliance with Sec. 102(2)(c), discussing the significant environmental effects of the transportation of coal to TVA facilities. The District Court dismissed petitioners' complaint, citing F.R.C.P. 12 (b)(1),(6), & (7) in support of its ruling. This judgment was affirmed by the Court of Appeals.

As the nation's largest producer of electric power and its most plentiful consumer of coal, TVA enters into many long and short term contracts with private mine operators for the purchase of coal. In upper east Tennessee, TVA has a longstanding history, dictated by the economics of the industry in this area, of contracting with many of the same operators, whether on a long or short term basis. As a result, TVA over the years has gained substantial familiarity and insight into the methods — particularly, their record of compliance with state law — these contractors use to meet their contractual obligation of supplying coal to such generating facilities as the Kingston Steam Plant, Kingston, Tennessee (hereinafter referred to as steam plant), the focal point of this action. This steam plant receives about two million tons of coal each year, about twenty-five percent of the total output in east Tennessee, much of which is transported over a network of county, state, and federal highways in gigantic trucks whose gross weight consistently exceeds the 73,280 pound maximum allowed by Tennessee law. Immediately upon arriving at the plant, often in a

steady stream, the trucks are weighed by TVA and the coal is dumped into TVA's storage yard or hopper.

As conceded by TVA in this action, a substantial number of the many trucks delivering coal to the steam plant exceed the maximum permissible gross weight limitation of 73,280 pounds contained in *Tenn. Code Ann.* Sec. 59-1109. Moreover, many of the trucks are in violation of the per axle weight, height, and length limitations contained in section 59-1109, which states in unusually emphatic terms: "[I]t is the legislative intent that the prescribed weight, height, and length limit shall be strictly enforced and it shall be unlawful for any state, county, or municipal officer to allow or permit any additional weight, height, or length by way of tolerance or otherwise." Pursuant to *Tenn. Code Ann.* Sec. 59-1112, any violation of section 59-1109 constitutes a misdemeanor subjecting the offender to a fine of not less than $25.00 nor more than $500.00 for each violation.

SOCM is a grassroots citizens group with some 200 members living in Tennessee's five largest coal counties. The members of SOCM have long been concerned about the dangers generated by the unabated flow of overweight coal trucks to the steam plant. Literally tearing through the pavement of roads used extensively by SOCM members in their daily intercourse, these overburdened coal trucks leave in their wake giant potholes, sharp indentations, numerous crags and gulleys, and an obstacle course of large coal chunks. As a result of this massive damage over miles of bucolic, rural roadway, SOCM members are injured

in a variety of ways: (1) their automobiles are subject to extraordinary damage; (2) their safety is threatened every time they take behind the wheel; (c) their counties are forced to allocate a disproportionate share of tax revenues to keep the roads minimally passable, thus depriving these counties, some of Tennessee's poorest, of money for necessary social services; (4) their continued existence in their ancestral area is threatened since the absence of good roads inhibits industrial development and tourism; and (5) their aesthetic sensibilities are constantly jarred by the impairment of their immediate environment. By having to endure these many deprivations, the petitioners wind up subsidizing cheap electricity for all other TVA consumers.*

Prior to initiating this action, SOCM exhorted the responsible state authority, the Tennessee Department of Revenue, to halt the unremitting flow of overweight vehicles to the steam plant. While acknowledging the seriousness of the situation, the state replied that it did not possess sufficient manpower to patrol this large geographical area for violations. When asked why a check-point could not be established immediately outside the steam plant, the eventual destination of all trucks, the state replied that the establishment of such a check-point would entail serious

*See C. Harvey, *The Economic Impact of Enforcing Weight Restrictions on Eastern Kentucky Roads* (1971) (monograph prepared by the Office of Development Services and Business Research, College of Business and Economics, University of Kentucky)

dangers to the inspectors, truckers, and passing motorists because the roadway was too narrow to accomodate safely the portable scales used by the inspectors. Subsequent contact with state officials by SOCM representatives revealed their belief that blanket rejection by TVA of overweight deliveries was the only effective solution to the problem and that such action by TVA would materially assist the state's law enforcement efforts.

Unable to obtain relief from the state, petitioners were faced with the choice of bringing a multiplicity of lawsuits under an exceptionally standardless statute (*Tenn. Code Ann.* 59-1112) in numerous state forums traditionally solicitous to the interests of the coal truckers, or attempting to gain complete relief in one federal forum based on TVA's complicity in the illegal actions of their contractors. Ironically, two months before the commencement of this action, TVA announced that it would begin enforcing a policy of rejecting the trucks of short term contractors not in compliance with the Tennessee weight scheme. TVA founded this authority on contractual clauses inserted in the short-term contracts, provisions not existing in long-term contracts negotiated years earlier and under which the bulk of trucked coal was delivered. After only one day of enforcement, TVA succumbed to the protests of the short-term contractors, mostly small operators, who claimed that TVA was unfairly discriminating against them in an alleged attempt to force them out of business to the profit of the long term, larger contractors.

By letter of August 25, 1972, petitioner J.W. Bradley, on behalf of the members of SOCM, urged TVA immediately to impose a policy of blanketly rejecting all trucks not in conformance with state law. The letter recounted the pervasive damage caused by the overweight vehicles and the consequent injury to members of SOCM and residents of the area and reminded TVA of its statutory mandate to foster the economic well-being of *all* citizens in its area of operations. TVA's reply, through Chairman Aubrey Wagner, summarized TVA's abortive enforcement effort and justified its current policy on grounds of contractual obligation.

Failing to obtain redress from TVA, petitioners filed a Complaint in the United States District Court for the Eastern District of Tennessee (a copy of this Complaint is included in the Appendix, *infra*, p. 6a) requesting declaratory and injunctive relief. In addition to the overriding claim seeking to impose upon TVA the responsibility of rejecting illegally overweight deliveries, petitioners also asserted that, in view of the widespread damage resulting from the transportation of coal to TVA facilities, TVA's failure to prepare an environmental impact statement or include in its existing program statement a discussion consistent with section 102(2)(c) of NEPA constituted a violation of federal law. Following a hearing on petitioner's Motion For a Preliminary Injunction in which only oral argument by counsel was permitted, the District Court entered an Order accompanied by a short memorandum opinion dismissing the action. Failing entirely to consider petitioners' NEPA claim, despite the fact that this

claim had been briefed extensively in petitioners' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, the District Court couched "[t]he gravamen of the complaint [to be] the failure of TVA to enforce a state statute against a non-party to this action." Having thus framed the issue, the District Court found that no federal right or immunity was being violated by TVA's policies and cited recent cases of this Court dealing with federal intervention in state criminal proceedings (e.g. *Younger* v. *Harris*, 401 U.S. 37 (1971) as support for the proposition that "[t]he Governor of Tennessee is charged with the responsibility for enforcing state laws, not TVA." The Court of Appeals affirmed this judgment "for the reasons set forth in the order of the district court."

REASONS FOR GRANTING THE WRIT

I.

THE QUESTION WHETHER A FEDERAL AGENCY MAY BE ENJOINED FROM FOSTERING, THROUGH CONTRACTUAL ACTIVITY, THE FRUSTRATION OF SHARPLY DEFINED STATE LAW IS ONE OF NOVEL IMPORTANCE TO ALL FEDERAL AGENCIES AND TO OUR SYSTEM OF FEDERALISM.

The basic question first raised in this case is whether a federal court may impose responsibility on a federal agency to conduct its business with its contractors in a way which does not result in the systematic violation of state law. Throughout this case, TVA has

argued that only the state of Tennessee — either through its state enforcement personnel or its judiciary — has the duty of enforcing state weight statutes flagrantly ignored by virtually all of TVA's contractors. Petitioners recognize this responsibility on the part of the state but also contend that TVA has a responsibility — rooted in fundamental principles of federalism and federal agency conduct — to cease any activity on its part that contributes in any way to the widespread violation of sharply defined state law and policy.

Although inconsistently dismissing the Complaint both for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, the District Court — concurred in by the Court of Appeals — focused on the former ground in its opinion. Petitioners submit that this is an issue peculiarly cognizable by a federal court under either 28 U.S.C. Sec. 1331(a), 28 U.S.C. Sec. 1361, or certainly as an ancillary claim to petitioner's NEPA allegations discussed *infra*. To abdicate jurisdiction in a case as compelling as this is to close the federal courts to any citizen who is injured by activities attributable to a federal agency and to allow such an agency to sit back and reap the benefits of illegal activity while disclaiming responsibility for it.

Throughout this litigation, petitioners have contended that the general federal question statute was designed to reach the situation presented by this case. It has not been disputed that the first prong of 28

U.S.C. Sec. 1331(a), requiring the matter in controversy to exceed $10,000, exclusive of interests and costs, is satisfied by petitioners' Complaint. The considerable interests of the petitioners in free and unimpaired road travel would seem to put beyond question the jurisdictional amount provided in Sec. 1331(a).

The second requirement of Sec. 1331 (a), that the action arises under the Constitution, laws, or treaties of the United States, is likewise satisfied by the allegations of claimed rights, in particular under the Tennessee Valley Authority Act of 1933, 16 U.S.C. Sec. 831 *et seq.* For jurisdictional purposes only, petitioners contend that it is enough to claim colorable rights under federal law arguably intended to protect them. Whether these laws yield the claimed rights is a question that goes to the merits of this controversy and can only be answered following a full factual hearing and consideration of the relevant law.

A broader approach to the question of jurisdiction more strongly supports petitioners' position. In *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972), a unanimous Court, rejecting the argument that parties must point to a specific federal statute as a prerequisite to invoking federal jurisdiction under Sec. 1331(a), expansively interpreted the word "laws" in Sec. 1331(a) to include the broad range of federal common law. This interpretation has direct import for this issue. Petitioners' dominant contention, discussed *infra,* is that as a matter of sound federalism as expounded in decisions of this Court, a federal court should enjoin a federal agency from activity

that materially frustrates the operation of a state statute. This contention, deriving its very existence from federal common law and the Constitution, should be sufficient to support jurisdiction under the second prong of Sec. 1331 (a). Minimally, this Court should grant certiorari to clarify the lower courts' restrictive interpretation of jurisdiction under Sec. 1331(a).*

No less is implicated in the merits of this case than the paramount issue of governmental lawlessness. The general federal policies underlying this issue were well stated in the dissent of Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438 (1928):

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of law, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the

*Petitioners also believe that jurisdiction over this issue properly lies under 21 U.S.C. Sec. 1361 and under the concept of ancillary jurisdiction, the NEPA claim, *infra*, supplying clear grounds for jurisdiction to be assumed over the whole Complaint. The District Court also cited failure to join a party under Rule 19, F.R.C.P. 12(b)(7), as a ground for dismissal. Petitioners claim that this ground of dimissal is erroneous under the doctrine of *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1950), where this Court found public rights superior to contractual rights in an action to restrain the performance of contracts. In any event, even if it is concluded that TVA's contractors are indispensable parties to this action, petitioners should be given the opportunity to amend their Complaint to include such parties. Outright dismissal is simply too harsh a final outcome.

> omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto itself; it invites anarchy." *Id.* at 485

Whether it can generically be called aiding or abetting or conspiracy, TVA's activities in the present case exhibit the kind of turpitude that is antithetical to the proper functioning of a federal agency in our federal system. Well informed that the coal contracts it lets cannot be fulfilled without systematic violations of state law, TVA continues to accept the fruits of such contracts. TVA's rejection of responsibility for the destruction wreaked over miles of Tennessee roadway brings to mind the proverbial image of the three monkeys. It is hardly irresponsible to call such conduct criminal.*

The impropriety of TVA's activities in this case takes on added importance in the special context of federal-state relations in which all federal agencies are bound to operate. Under well recognized principles of federalism and federal-state comity, federal courts, as a matter of sound policy, should not tolerate conduct by a federal agency that serves to defeat explicitly elucidated state laws and policies. This proposition was firmly established in federal jurisprudence in a case remarkably analogous to the case at bar. In *Tank*

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*At common law, TVA's criminal culpability in knowingly accepting the illegally overweight deliveries is well established. *National Coal Board* v. *Gamble*, 42 Cr. App. R. 240 (Div. Ct. 1958) (Goddard, C.J., Devlin, Slade, JJ.)

Truck Rentals, Inc. v. *Commissioner of Internal Revenue*, 356 U.S. 30 (1956), this Court upheld the disallowance of deductions claimed by taxpayers, owners of a fleet of motor carriers, for fines and penalties imposed on them for violation of Pennsylvania statutes governing the maximum weight limit for trucks operated on commonwealth highways. The rationale of the unanimous Court is directly applicable to the facts of the instant case:

> "Here we are concerned with the policy of several states evidenced by penal statutes enacted to protect their highways from damage and to ensure the safety of all persons using them . . . It is clear that assessment of the fines was punitive action and not a mere toll for use of the highways. The fines occurred only in the exceptional instances when the overweight run was detected by the police. Petitioner's failure to comply with state laws obviously was based on a balancing of the cost of compliance against the chance of detection. Such a course cannot be sanctioned, *for judicial deference to state action requires, whenever possible, that a state not be thwarted in its policy. We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a state. To allow the deductions sought here would but encourage continued violations of state law by increasing the odds in favor of noncompliance. This could only tend to destroy the effectiveness of the state's maximum weight laws.*" *Id.* at 34, 35. (emphasis added).

This reasoning underscores the strong judicial aversion to any governmental conduct that encourages violations

of state law and aptly sums up the central reason why this case is a decidely appropriate one for certiorari to be granted.

Although in a different context, the policy enunciated in *Tank Truck Rentals* was reaffirmed in *Elkins* v. *United States*, 364 U.S. 206 (1960), where this Court held that articles obtained as a result of an unreasonable search and seizure by state officials without the involvement of federal officers may not be introduced by federal officers against a defendant in a federal criminal trial. Hinging its reasoning on considerations of federalism, the opinion observed that it was improper for a federal official — whether overtly or tacitly — to encourage violation of state law and that the federal judiciary should not acquiesce in any activity of the federal government that serves to defeat valid state policy. *Id.* at 221-24. In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), analogous reasoning was used in a suit brought by black federal taxpayers to enjoin the Secretary of the Treasury from granting tax exempt status to Mississippi private schools that discriminated against blacks. In upholding the arguments of the plaintiff on the public policy ground that such tax exemptions frustrated the national policy favoring integration of schools, the court again pointed out that federal courts have the power to correct the improper action of federal officials when such action defeats federal or state policy. It is this core principle of government that lies at the heart of the present case.

This Court's concern for the proper functioning of our federal system should prompt it to look askew at the

District Court's citations to *Samuels* v. *Mackell*, 401 U.S. 66 (1971) and *Younger* v. *Harris*, 401 U.S. 37 (1971), ostensibly to support the proposition that only the state — not TVA — has responsibility for guarding against violation of its statutes. If for this reason alone, this petition should be granted to correct the lower court's gross misimpression of the meaning of *Samuels* and *Younger*. As noted in the statement of facts, Tennessee would welcome the relief sought by petitioners here. Therefore, rather than "crippling" the state's enforcement efforts, as was the concern in *Samuels*, the relief sought by petitioners would further this Court's concept of federalism by recognizing TVA's special obligation as a federal agency to refrain from any activity that encourages the commission of a crime by those it does business with on a regular basis. See generally L. Jaffe, *Judicial Control of Administrative Action* 590-91 (1965).

Acceptance of this case for review would also provide this Court with a unique opportunity to construe and breathe life into the ethical standards governing the conduct of federal agency employees. TVA's ethical guidelines are found in 18 C.F.R. Sec. 300.735-1 *et seq.*, which state as their purpose "[t]he maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by government employees. . . to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government." Specifically, these regulations proscribe TVA employees from engaging in any activity which might "[affect] adversely the confidence of the public in the integrity of TVA" (Sec. 300.735-11

(i)); restrain TVA employees from engaging in "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government (Sec. 300.735-19); and hold TVA employees to the "Code of Ethics for Government Service," expressed in House Concurrent Resolution 175, 85th Cong., 2d Sess., 72 Stat. B 12, which requires any person in government service to "uphold the Constitution, laws, and legal regulations of the United States and of all governments therein *and never be a party to their evasion.*" (Sec. 300.735-20(a)) (emphasis added). Unless these regulations are mere empty vessels, it is the duty of the federal judiciary to conform agency conduct to the high standards set by these guidelines. By holding TVA to be in contravention of their own ethical regulations, this Court would be setting a salutary precedent at a time when confidence in government at all strata is notably low.

II.

THE FAILURE OF THE LOWER COURTS TO CONSIDER PETITIONERS' CLAIM ARISING UNDER SECTION 102(2)(c) OF NEPA, WHICH WAS PLAINLY INCLUDED ON THE FACE OF THE COMPLAINT AND STATES A PRIMA FACIE CAUSE OF ACTION, CONSTITUTES A SERIOUS ABUSE OF DISCRETION WHICH THIS COURT SHOULD CORRECT.

Paragraph 25(a),(b), & (c) of petitioners' Complaint explicitly alleges facts which, if taken as true, constitute a major violation of the procedural requirements of NEPA, 42 U.S.C. Sec. 4332(2)(c). Para-

graph 1(c) of the Prayer for Relief evinces that this discrete claim is an integral part of petitioners' overall action against TVA. Paragraphs 2 and 3 of the Complaint contain the necessary and sufficient jurisdictional allegations to confer jurisdiction over this straightforward environmental claim. Petitioners find it inconceivable, therefore, that this separate issue, briefed fully in both the District Court and the Court of Appeals, can evaporate without any judicial consideration merely because petitioners' distinct first cause of action is dismissed. As the overseer of the federal judiciary, it is incumbent on this Court to grant certiorari to correct this grave abuse of discretion by the lower courts, particularly since the claim involves an as yet unresolved question under NEPA.

The crux of this issue revolves around whether TVA's involvement with its coal contractors in their transportation of coal to TVA facilities amounts to "major Federal action significantly affecting the quality of the human environment." See generally *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463 (5th Cir. 1973); *Hanly* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972). If TVA's activities fall within the purview of this section, then it is obligated to file a detailed environmental impact statement on the environmental consequences of the transportation of coal to TVA facilities. TVA has already filed an environmental impact statement entitled "Policies Relating to Sources of Coal Used by the Tennessee Valley Authority for Electric Power Generation." This statement, purportedly covering all of the present and future actions by TVA dealing with coal procurement, contains

no mention of the environmental effects of the transportation of coal by truck or otherwise to TVA generating plants. Whether the issue boils down to the inadequacy of this statement, which subsequent to the filing of this action has been challenged on entirely separate grounds (*Natural Resources Defense Council* v. *TVA*, 5 ERC 1669 (E.D. Tenn. July 24, 1973) or the necessity of TVA having to file an independent impact statement, the failure of the lower courts to consider this issue at all is an error of such magnitude that review of this case or outright reversal by this Court is the only recourse left for petitioners in their attempts to hold TVA partially accountable for the destruction of their immediate environment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit.

Respectfully submitted,

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ORDER OF THE UNITED STATES COURT OF APPEALS

No. 73-1079

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAVE OUR CUMBERLAND MOUNTAINS, INC. et al., Plaintiffs-Appellants,

vs.

TENNESSEE VALLEY AUTHORITY, et al., Defendants-Appellees

(Filed June 14, 1973)

BEFORE: WEICK and MC CREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

The appeal from dismissal of the complaint having come on to be heard upon briefs and oral argument, upon consideration, it is ORDERED that the judgment be, and it hereby is affirmed for the reasons set forth in the order of the district court dated October 25, 1972.

Entered by order of the court

/s/ James A. Higgins

Clerk

* * * * * * *

ORDER DENYING PETITION FOR REHEARING

[Caption Omitted]

(Filed July 11, 1973)

BEFORE: WEICK and MC CREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

Upon consideration, the petition for rehearing is hereby denied.

Entered by order of the court

/s/ James A. Higgins

Clerk

* * * * * * *

ORDER OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE NORTHERN DIVISION

SAVE OUR CUMBERLAND
MOUNTAINS, INC., ET AL.,

vs.

TENNESSEE VALLEY
AUTHORITY, ET AL.

Civil Action No. 8035

(Filed October 25, 1972)

Plaintiffs seek declaratory and injunctive relief prohibiting the Tennessee Valley Authority (T.V.A.) from accepting delivery of coal from private contractors when tendered in trucks that are overloaded in violation of the Tennessee weight limitation statute, T.C.A. Secs. 59-1108, 59-1112. T.V.A. denies that it has police or regulatory power over private parties to enforce state statutes. It contends that it would breach it contract with its term contractors, if it rejected a tender of delivery on the ground that the delivery truck was overloaded.

The facts are essentially undisputed. T.V.A. is a wholly-owned corporation of the United States au-

thorized to generate electric power. It contracts with private mine operators for the purchase of coal, f.o.b. Kingston Steam Plant, in order to generate power at that plant. It weighs the delivery trucks before and after unloading, and it acknowledges that a "substantial number" exceed the gross maximum weight permitted under Tennessee law. None of these term contracts grant T.V.A. an option to reject delivery in overloaded trucks. It has notified the Governor of Tennessee of these violations of state law.

Plaintiff, J. W. Bradley, lives on Highway 116 over which said trucks transport coal to the Kingston Steam Plant. He deposes that around one hundred such trucks pass his house each day "practically all" of which are overloaded. He further deposes that overloading damages the state and county roads, resulting in extraordinary wear and tear on private vehicles, including his own, and creating a safety hazard to local drivers.

The T.V.A.'s motion to dismiss must be sustained. The gravamen of the complaint is the failure of T.V.A. to enforce a state statute against a non-party to this action. The facts alleged do not remotely suggest that T.V.A. is violating any federal right of immunity. See *Gully* v. *First National Bank*, 299 U.S. 108, 112 (1936). The state statute creates both penal and injunctive sanctions to prevent overloading. The Governor of Tennessee is charged with the responsibility for enforcing state laws, not the T.V.A. See *Samuels* v. *Mackell*, 401 U.S. 66; *Boyle* v. *Landry*, 401 U.S. 77; *Perez* v.

Ledesma, 401 U.S. 82; *Younger* v. *Harris,* 401 U.S. 37, 44. Accordingly, it is ORDERED that the motion to dismiss be, and the same hereby is, sustained. Rule 12(b) (1), (6) & (7), F.R.C.P.

Enter:

/s/ Robert Taylor
United States District Judge

* * * * * * *

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE
Civil Action No. 8035

SAVE OUR CUMBERLAND MOUNTAINS, INC., J. W. BRADLEY, in his individual capacity as a taxpayer of the State of Tennessee and as President of Save Our Cumberland Mountains, Inc., PLAINTIFFS,

vs.

TENNESSEE VALLEY AUTHORITY; BOARD OF DIRECTORS OF TENNESSEE VALLEY AUTHORITY; AUBREY WAGNER, Chairman, Board of Directors of Tennessee Valley Authority in his individual and representative capacity, DEFENDANTS.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

(Filed September 25, 1972)

Plaintiffs allege as follows:

I. Preliminary Statement of the Complaint

1. This is an action by a grassroots citizens group, its members, and its President, J.W. Bradley, for a declaratory judgment and a preliminary and

permanent injunction prohibiting the Tennessee Valley Authority (hereinafter TVA) from knowingly and willingly accepting coal hauled in trucks operated in violation of the weight limitations established by federal and Tennessee law. Plaintiffs, who are directly injured by this policy and practice, claim that this conduct by the TVA, a government instrumentality, frustrates sharply defined national and state policies as evidenced by specific Congressional and state enactments governing highways, the environment, and economic development and contravenes TVA's own statutory mandate and administrative regulations.

II. JURISDICTION

2. This court has jurisdiction of this case by virtue of 5 U.S.C. Sec. 701-706 (Administrative Procedure Act); 28 U.S.C. Sec. 1331(a) (Federal Question); 28 U.S.C. 1337 (Commerce); and 28 U.S.C. Sec. 1361 (Mandamus).

3. This action arises under 16 U.S.C. Sec. 831 *et seq.* (Tennessee Valley Authority Act of 1933); 23 U.S.C. Sec. 127 (Federal-Aid-Highways Act of 1956); 28 U.S.C. Sec. 2201, 2202 (Declaratory Judgment); 42 U.S.C. Sec. 4201 *et seq.* (Intergovernmental Cooperation Act of 1968); 42 U.S.C. Sec. 4321 *et seq.* (National Environmental Policy Act of 1969).

4. The amount in controversy in this case exceeds $10,000 exclusive of interest and costs.

III. PLAINTIFFS

5. SAVE OUR CUMBERLAND MOUNTAINS, INC., (hereinafter SOCM), a non-profit membership corporation incorporated under the laws of Tennessee, is a citizens group in upper east Tennessee working for a better life for the residents of the coal communities. With some 200 dues paying members living in Claiborne, Morgan, Scott, Anderson, and Campbell Counties, Tennessee, SOCM is vitally interested in the acts, policies, and practices of any government agency that work to the detriment of the economic, health, safety, recreational, conservational, and aesthetic interests of its members. Many SOCM members live near and regularly drive the numerous roads and highways over which TVA contractors haul coal in illegal, overweight coal trucks. Because of the dangerous conditions on these roads resulting from the operation of illegal, overweight coal trucks by TVA contractors, the economic, medical, environmental, recreational, and aesthetic well-being of SOCM members is adversely affected and injured.

6. Specifically, the automobiles driven and owned by SOCM members are constantly being damaged and depreciated in value as a result of the structural road damage caused by the continuous operation of illegal, overweight coal trucks by TVA contractors. The hazardous road conditions also pose grave safety problems for SOCM members who must drive these roads daily. On information and belief, SOCM members are further injured by having to pay higher tax revenues

to keep the affected roads minimally passable and by having to endure the aesthetic and environmental destruction wreaked by overweight coal trucks.

7. J. W. Bradley is a resident of Petros, Morgan County, Tennessee and lives on Highway 116, a state road over which overweight coal trucks regularly travel in route to TVA's Kingston Steam Plant. He is a taxpayer of the State of Tennessee and President of Save Our Cumberland Mountains, Inc.

IV. DEFENDANTS

8. The Tennessee Valley Authority, with headquarters in Knoxville, Tennessee, is a federal agency and government corporation "charged with the duty of constantly studying the whole situation presented by the Tennessee River Valley, and the adjoining territory, with the view of encouraging and guiding in the orderly and balanced development of the diverse and rich resources of that section." H.R. Rep. No. 48, 73d Cong., 1st Sess. 10-11 (1933). In implementing its general purposes under 16 U.S.C. Sec. 831 v, one of which is to ensure "the economic and social well-being of the people living in said river basin," TVA conducts a variety of developmental and conservational activities, including the production of electric power.

9. The TVA Board of Directors is mandated by 16 U.S.C. Sec. 831a(g) to direct the exercise of all the powers of the Corporation.

10. Aubrey Wagner is the Chairman of the Board

of Directors of TVA and is the official directly responsible for the acts, policies, and practices of all TVA operations.

V. FACTS

11. As an integral part of their electric power generation activity, TVA contracts for the procurement of coal from private surface and deep mine operators, many of whom transport this coal by truck directly to TVA power generating facilities, in particular, the Kingston Steam Plant, Kingston, Tennessee.

12. The weight of these trucks is explicitly regulated by Tennessee Code Annotated Sec. 59-1109 (1955), which provides in pertinent part:

> *Maximum weight per single axle or group of axles allowed.* — "Except as other provided by law, no freight motor vehicle shall be operated over, on, or upon the public highways of this state whre the total weight on a single axle, or any group of axles, exceeds the weight limitations set forth below in subsections A, B, C, D, E, and F.
>
> A. No axle shall carry a load in excess of eighteen thousand (18,000) pounds, provided that no front axle on truck tractors as defined in Sec. 59-104 shall carry a load in excess of twelve thousand (12,000) pounds.
>
> Axle combinations and fifth wheel placement on the tractors shall insure equal weight distribution on weight carrying axle combinations and such axle combinations shall be equipped with brakes having power motivation.

An axle load as set out herein is defined as the total load transmitted to the road by all wheels whose centers may be included between two (2) parallel transverse vertical planes, forty (40) inches apart, extending across the full width of the vehicle.

B. The total gross weight concentrated on the highway surface from any tandem axle group shall not exceed thirty-two thousand (32,000) pounds for each such tandem axle group. A "tandem axle group" is defined to be two (2) or more axles spaced forty (40) inches or more apart from center to center having at least one (1) common point of weight suspension.

C. No freight motor vehicle, truck tractor, trailer or semitrailer, nor combinations of such vehicles, shall be operated over, on or upon the public highways of this state where the total gross weight of such vehicle, or combination thereof including the load thereof, exceeds seventy-three thousand two hundred eighty (73,280) pounds, except such vehicles, or combinations thereof, operate under special permits not authorized by law; provided, that wherever a maximum permissive gross weight of seventy-three thousand two hundred eighty (73,280) pounds or a length of fifty (50) feet or a height of thirteen and one-half (13½) feet is authorized for any vehicle or combination of vehicles, it is the legislative intent that the prescribed weight, height and length shall be strictly enforced and it shall be unlawful for any state, county, or municipal officer to allow or permit any additional weight, height or length by way of tolerance or otherwise, except that the commissioner of highways may issue special permits as provided by Sec. 59-1111.

D. A freight motor vehicle, as used in this section, includes both the tractor or truck and the trailer, semitrailer or trailers, if any, and the weight of any such combination shall not exceed the maximum fixed herein; provided, however, that no freight motor vehicle with motive power shall haul more than one (1) vehicle.

13. Violation of Sec. 59-1109 is governed by Tenn. Code Ann. Sec. 59-1112, which provides in pertinent part:

Penalty for violation of Sec. 59-1107 — 59-1111 — Injunction proceedings — Disposition of fines, penalties and forfeitures. — Each violation of Sec. 59-1107 — 59-1109 and each violation of restrictions on the maximum gross weight of freight motor vehicles duly adopted and promulgated by the commissioner of highways, under 59-1111, and each violation of rules and regulations duly adopted and promulgated by the commissioner of safety under said section, shall be a misdemeanor and, upon conviction thereof, a fine of not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500) shall be assessed. Any taxpayers of the state shall have the right by injunction proceedings to enjoin any actual or threatened use of any highway prohibited by said sections. All fines, penalties and forfeitures of bonds imposed or collected under this section shall be paid within ten (10) days after receipt thereof to the department of safety with a statement accompanying the same, setting forth the action or proceedings in which such moneys were collected, the name and residence of the defendant, the nature of the offense, and fine, penalty, or forfeiture imposed. Provided, however, where

said fines, penalties and forfeitures are imposed because of arrests made by employees of the Department of Revenue, the same shall be paid over immediately to the commissioner of revenue, who is authorized to take all steps necessary to enforce the collection and prompt return thereof. Such fines, penalties and forfeitures when so collected by either the Department of Safety or the commissioner of revenue shall be deposited with the Treasurer of the State and shall become a part of the general funds of the state.

14. Upon arrival at the Kingston Steam Plant, a federal reservation, the trucks are initially weighed on official TVA scales and then permitted to dump their load.

15. Despite the clear language of Tennessee law, it is the officially announced policy and practice of TVA to accept at its Kingston Steam Plant coal, pursuant to contract, from trucks operating in violation of Tenn. Code Ann. Sec. 59-1109. This pattern and practice encompasses a vast majority of the trucks that enter the facility. Official TVA daily truck scales reports reveal the following figures for a randomly selected time period:

Date	No. Trucks On Scales	No. Trucks Overweight	Percent Overweight	Heaviest Load
9/15/72	277	258	91	100,000 lbs.
9/18/72	369	345	93	100,000 lbs.
9/19/72	346	315	91	95,600 lbs.
9/20/72	289	262	91	98,700 lbs.

16. In traveling to the Kingston Steam Plant, these trucks drive over numerous county, state, and,

on information and belief, federal roads and highways, causing extensive damage to these thoroughfares in the form of large potholes, bumps, and other types of serious structural damage and decay.

17. On or about August 10, 1972, TVA initiated a policy of rejecting coal deliveries brought to the Kingston Steam Plant in illegal, overweight trucks operated by short-term (spot) contractors. TVA claimed that the authority to reject these deliveries emanated from recently inserted contract provisions reserving to TVA the right to reject trucks carrying more coal than state law permitted. Since similar provisions were not present in TVA's contracts with long-term operators, TVA simultaneously continued to accept deliveries from long-term contractors despite the fact that these deliveries were made in trucks exceeding Tennessee weight laws.

18. On or about August 16, 1972, TVA publicly announced that it was abandoning its efforts to enforce the overload provisions in spot contracts and would revert to its former policy and practice of accepting all coal deliveries from trucks operating in violation of Tennessee weight law. This policy and practice is currently in effect.

19. On or about August 25, 1972, SOCM wrote TVA expressing its profound concern over TVA's policy and practice relating to the operation of overweight coal trucks at the Kingston Steam Plant, informed TVA of the injury to its members, and demanded that this policy and practice be changed in

favor of a policy and practice of blanketly rejecting all trucks not in conformance with Tennessee weight law (a copy of the letter is attached to this Complaint as Attachment A and made a part hereof).

20. TVA responded by reaffirming its policy of accepting illegal, overweight coal trucks and relied on its contracts with long-term operators as a justification for its actions (a copy of the letter is attached to this Complaint as Attachment B and made a part hereof).

VI. VIOLATIONS OF LAW

21. TVA's acts, policy, and practice relating to the acceptance of illegal, overweight coal trucks frustrate and thwart sharply defined state policies as evidenced by Tenn. Code Ann. Sec. 59-1109, 59-1112, penal statutes enacted to protect the Tennessee highways from damage and the safety of all persons using them.

22. TVA's acts, policy and practice foster and encourage violation of federal law and policy as specifically alleged in paragraphs 23, 24, 25, 26.

23.a) The Kingston Steam Plant is a federal reservation over which this court has exclusive jurisdiction.

b) 18 U.S.C. Sec. 13 adopts the Tennessee weight laws and other Tennessee laws as federal law on federal property and makes the violation of these laws a federally cognizable crime.

c) TVA's acts, policy, and practice illegally

involve TVA in the commission of a federally cognizable crime.

24. TVA's acts, policy, and practice violate national substantive environmental policy as expressed in 42 U.S.C. Sec. 4321 *et seq.* (National Environmental Policy Act of 1969) (hereinafter NEPA).

25.a) TVA failed to comply with NEPA, 42 U.S.C. Sec. 4332 (2)(c), by not including in its environmental impact statement ("Final Environmental Statement — Policies Relating to Sources of Coal Used by the Tennessee Valley Authority for Electric Power Generation" — TVA-OHES-E15-71-4), filed with the Council on Environmental Quality, a detailed discussion, as required by NEPA, 42 U.S.C. Sec. 4332 (a)(c)(i) & (ii), of the environmental impact of and unavoidable adverse environmental effects of TVA's policy and practice relating to the acceptance of illegal, overweight coal trucks.

b) TVA's environmental impact statement also failed entirely to discuss, as required by NEPA, 42 U.S.C. Sec. 4332 (2)(c)(iii), alternatives to TVA's current policy and practice and the environmental impact of these alternatives.

c) TVA's current policy and practice represents an integral part of TVA's involvement in the coal mining industry.

26.a) TVA's acts, policy, and practice foster and encourage violation of the weight limitation (73,280 pounds) for federal-aid highways contained in 23 U.S.C. Sec. 127 (Federal-Aid Highways Act of 1956).

b) TVA's acts, policy, and practice foster and encourage violation of the regulations governing truck safety promulgated by the Department of Transportation, Federal Highway Administration, 49 C.F.R. Sec. 392.2, 392.9, 393.85, which prescribe standards for vehicle cargo distribution.

27. TVA's acts, policy, and practice violate Congress's declaration of developmental assistance policy expressed in 42 U.S.C. Sec. 4231 *et seq.* (Intergovernmental Cooperation Act of 1968), which requires federal agencies to cooperate with state officials in the promotion of economic development.

28. TVA's acts, policy, and practice are outside, in excess of, and contrary to TVA's statutory authority as embodied in 16 U.S.C. Sec. 831 *et seq.* (The Tennessee Valley Authority Act of 1933) and constitute an abuse of the agency's discretion thereunder and under TVA's own regulations in the following respects:

a) TVA's acts, policy, and practice violate its mandate, as expressed in 16 U.S.C. Sec. 831, 831 v, to ensure "the economic and social well-being of the people living in said river basin."

b) TVA's acts, policy, and practice violate its general mandate, as expressed throughout 16 U.S.C. Sec. 831 *et seq.* of promoting orderly economic development and maximum conservation throughout the areas of its operations.

c) TVA's acts, policy, and practice violate its own administrative regulations, entitled Ethical and

Other Conduct Standards and Responsibilities of Employees and Special Government Employees. 18 C.F.R. Sec. 300.735-1, 300.735-11(f), 300.735-19, 300-735-20, 300.735-35, 300.735-36. These regulations establish a code of conduct for all TVA employees and emphasize the special obligations and duties of federal government personnel. By encouraging and fostering violation of national and state laws and policies and frustrating their effectiveness, TVA is acting contrary to its own prescribed standards of conduct.

VII. EQUITY

29. There is an actual controversy among the parties. Plaintiffs are suffering and will continue to suffer irreparable injury by virtue of the defendants' acts, policy, and practice relating to illegal, overweight coal trucks. Unless restrained, the defendants will continue their acts, policy, and practice. Plaintiffs have no adequate remedy at law. Plaintiffs have exhausted their administrative remedies.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

1. That this court issue a declaratory judgment that the acts, policy, and practice of defendants in accepting illegal, overweight coal trucks:

a) Violate and frustrate sharply defined Tennessee policy as evidenced by Tenn. Code Ann. Sec. 59-1109, 59-1112.

b) Violate and frustrate declared national policy as expressed in the Federal-Aid Highways Act of 1956, the regulations of the Department of Transportation, the National Environmental Policy Act of 1969, the Intergovernmental Cooperation Act of 1968, and the fundamental federal policy against the commission of crimes on federal property.

c) Do not comply with NEPA, 42 U.S.C. Sec. 4332 (2) (c).

d) Exceed and contravene TVA's statutorily authorized functions as expressed in 16 U.S.C. 831 *et seq.* and TVA's own regulations.

2. That this court issue a preliminary and permanent injunction prohibiting the defendants, their officers, agents, employees, successors, and attorneys, and all other persons in active concert and participation with them from executing their policy of knowingly and willingly accepting at TVA's Kingston Steam Plant or any other TVA facility, coal received in trucks operating in violation of Tennessee weight laws.

3. That this court issue an order pursuant to U.S.C. Sec. 1361 ordering defendants TVA, TVA's Board of Directors, and Aubrey Wagner, to observe TVA's mandate and regulations, NEPA, and defined national and state policies as elaborated herein, which require them to accept coal under weight restrictions established by Tennessee law and under circumstances that will not adversely affect the environment of the affected area.

4. That this court advance the matter on its docket, order a speedy hearing at the earliest practicable date, and cause this case to be in every way expedited.

5. That this court grant the plaintiffs such other and additional relief as justice may require, together with costs and disbursements of this action.

Respectfully submitted,

/s/ Dean Hill Rivkin
Dean Hill Rivkin
Attorney for Save Our
Cumberland Mountains, Inc.
Appalachian Research and
Defense Fund
630 Maxwelton Court
Lexington, Kentucky 40506
606 257-2771

/s/ W.P. Boone Dougherty
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No. 73-619

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In the Supreme Court of the United States

OCTOBER TERM, 1973

SAVE OUR CUMBERLAND MOUNTAINS, INC., ET AL.,
PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

ROBERT H. MARQUIS,
General Counsel,
Tennessee Valley Authority.

HERBERT S. SANGER, JR.,
Deputy General Counsel,

JUSTIN M. SCHWAMM,
Assistant General Counsel,
Tennessee Valley Authority,
Knoxville, Tennessee 37902.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners' complaint in the United States District Court (Pet. App. 5a-16a) sought an injunction prohibiting the Tennessee Valley Authority ("TVA") from accepting delivery of coal which had been transported by independent coal contractors in trucks loaded in excess of the maximum weights prescribed by Tennessee statutes.[1] Petitioners also sought a

[1] The statutes involved, Tenn. Code Ann. Secs. 59-1108, 59-1109, 59-1111, and 59-1112 (1968; Supp. 1972), are reprinted in the Appendix to this memorandum. In addition to criminal penalties these statutes provide that:

Any taxpayers of the state shall have the right by in-

writ of mandamus ordering TVA to reject all coal deliveries in trucks which are overloaded under the Tennessee statutes.

The complaint does not allege that TVA itself violated the Tennessee weight statutes in any manner. On the contrary, the complaint specifically alleges that the "road damage [is] caused by the continuous operation of illegal, overweight coal trucks by TVA contractors" (Pet. App. 7a).[2]

The district court dismissed the complaint (Pet. App. 3a-4a), stating in part:

> The gravamen of the complaint is the failure of T.V.A. to enforce a state statute against a non-party to this action. The facts alleged do not remotely suggest that T.V.A. is violating any federal right or immunity. * * * The Governor of Tennessee is charged with the responsibility for enforcing state laws, not the T.V.A. [Pet. App. 4a].

The Sixth Circuit affirmed "for the reasons set forth" by the district court (Pet. App. 1a).

The courts below properly dismissed the complaint.

1. The district court did not have jurisdiction under 28 U.S.C. 1331(a) since that section requires that the matter in controversy arise "under

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junction proceedings to enjoin any actual or threatened use of any highway prohibited by [the weight limitation provisions of the statute].

[2] In the court of appeals, petitioner admitted that the coal did not become TVA's until it "was unloaded at the plant" (Appellants' brief 5).

the Constitution, laws, or treaties of the United States." Here, the principal objective of the complaint—in petitioners' words, their "overriding claim" (Pet. 7)—is to prevent the movement of overweight coal trucks by private parties on Tennessee's highways in violation of Tennessee criminal law. All "federal questions" sought to be raised are incidental to that objective and asserted only as a means of achieving it, and no federal law is an essential element of petitioners' case.

In such a situation no federal question is presented. Thus, in *Gully* v. *First Nat'l Bank*, 299 U.S. 109, cited by the district court, this Court said:

> To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.
>
> * * * *
>
> * * * We recur to the test announced in *Puerto Rico* v. *Russell & Co.*, *supra* [288 U.S. 476]: "The federal nature of the right to be established is decisive * * *" [299 U.S. at 112, 116].

Accord, *Pan Am. Corp.* v. *Superior Court*, 366 U.S. 656, 663-664; *Autry* v. *Crumpler*, 377 F.2d 547 (C.A. 4).

Petitioners' claim that TVA failed to comply with the National Environmental Policy Act by not including in a specified environmental impact statement (see Pet. App. 12a) a detailed discussion of the acceptance of coal deliveries by private contractors presents a question only incidental to the principal ob-

jective of this litigation as to which, under *Gully*, there is no federal jurisdiction. Moreover, petitioners did not seek any relief under NEPA concerning this statement and advanced no contention that TVA was required to file a separate environmental impact statement, as they now do in their petition to this Court.[3] Further, on the same day the district court dismissed petitioners' complaint, petitioners (and others) filed a new action in that court challenging directly the adequacy of that environmental statement. That case has been tried and judgment entered in TVA's favor. *Natural Resources Defense Council* v. *Tennessee Valley Authority*, 5 ERC 1316 (E.D. Tenn.), 5 ERC 1669 (E.D. Tenn.), notice of appeal filed. Thus there is no need for further review of that question in this case.

2. The mandamus statute, 28 U.S.C. 1361, confers no jurisdiction but merely provides a remedy in cases where federal jurisdiction exists on some other basis. *Rural Electrification Admin.* v. *Northern States Power Co.*, 373 F.2d 686, 694 n.14 (C.A. 8), certiorari denied, 387 U.S. 945; *Iowa City-Montezuma R.R. Ship. Ass'n* v. *United States*, 338 F. Supp. 1383, 1386 n.1 (S.D. Iowa). Moreover, mandamus is available only to enforce performance of a ministerial duty owed to the petitioners. *Panama Canal*

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[3] NEPA, of course, deals only with "federal actions" and not with private actions such as the violation of state laws by private contractors. Cf. *Civic Improvement Comm.* v. *Volpe*, 459 F.2d 957, 958 (C.A. 4); *Bradford Township* v. *Illinois State Toll Hwy. Auth.*, 463 F.2d 537 (C.A. 7), certiorari denied, 409 U.S. 1047.

Co. v. *Grace Line, Inc.*, 356 U.S. 309, 317-318; *McQueary* v. *Laird*, 449 F.2d 608, 611 (C.A. 10); *United States* v. *Walker*, 409 F.2d 477, 481 (C.A. 9); *Carter* v. *Seamans*, 411 F.2d 767 (C.A. 5); *Davis* v. *Shultz*, 453 F.2d 497, 502 (C.A. 3). Neither the TVA Act nor any other statute imposes on TVA any duty, much less a ministerial one, to determine whether contractors have violated state laws before accepting shipments from them. The adoption of a policy of doing so, as petitioners request, would be discretionary, and mandamus accordingly will not lie to require it. *Panama Canal Co.* v. *Grace Line, Inc., supra; Town of East Haven* v. *Eastern Airlines, Inc.*, 282 F. Supp. 507, 512 (D. Conn).[4]

3. Even if the district court had jurisdiction, it properly abstained from exercising it. Where the petitioners, as in this case, have an adequate state remedy in a state court under a state statute, federal jurisdiction should not be accepted. *Wilson* v. *Schnettler*, 365 U.S. 381; *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341; *Simmons* v. *Jones*, 478 F.2d 321 (C.A. 5); *Burks* v. *Perk*, 470 F.2d 163

---

[4] As is pointed out in petitioner's complaint (Pet. App. 11a, Nos. 17 and 18), TVA did at one time attempt to require contract provisions under which it could reject overweight shipments under its short-term contracts but was met with charges of discrimination because long-term contracts with major producers were still in effect without such clauses. There were no such provisions in effect in any contracts when this suit was filed. Rejection of coal shipments would thus have subjected TVA to breach-of-contract claims by the contractors, none of which was named as a defendant in

(C.A. 6); *Southern Ry.* v. *Chambers*, 376 F.2d 815 (C.A. 6), certiorari denied, 389 U.S. 830; *Porto Rico Tel. Co.* v. *Puerto Rico Commun. Authority*, 189 F. 2d 39 (C.A. 1), certiorari denied, 342 U.S. 830; *Johnson* v. *Riverland Levee Dist.*, 117 F.2d 711 (C.A. 8).

Petitioners may object to the private truckers' violation of state law, but, as the district court correctly pointed out, it is the state's responsibility to enforce that law, and petitioners have an available state law remedy in the state courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

ROBERT H. MARQUIS,
General Counsel,
Tennessee Valley Authority.

HERBERT S. SANGER, JR.,
Deputy General Counsel,

JUSTIN M. SCHWAMM,
Assistant General Counsel,
Tennessee Valley Authority.

NOVEMBER 1973.

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this suit. See *Stansell* v. *Roach*, 147 Tenn. 183, 191, 246 S.W. 520, 522; *Virginia Surety Co.* v. *Knoxville Transit Lines*, 135 F. Supp. 606, 613 (E.D. Tenn.); *Macco Const. Co.* v. *Farr*, 137 F. 2d 52 (C.A. 9).

APPENDIX

TENNESSEE CODE ANNOTATED
(10A Tenn. Code Ann. (1968; Supp. 1972))

59-1108. Maximum width and height.—No motor vehicle as defined in § 59-103 or any trailer or semi-trailer, whose width, including any part of the load, exceeds eight (8) feet (that is, four (4) feet on each side of the center line of the vehicle) or whose height, including any part of the load, exceeds thirteen and one-half (13½) feet, shall be operated on any highway, provided, that the provisions of this section shall not apply to farm tractors or farm machinery temporarily moving on any highway. In the event federal law and regulations thereunder permit the operation of passenger buses of widths in excess of eight (8) feet on the national systems of interstate and defense highways, then there may be operated on four lane highways and, for the purpose of ingress and egress to terminal facilities, such other highways as are designated and approved by the Tennessee commissioner of highways within the state of Tennessee passenger buses, the width of which do not exceed eight (8) feet six (6) inches, or such width, not exceeding eight (8) feet six (6) inches, as is permitted under such federal rules and regulations.

59-1109. Maximum weight per single axle or group of axles allowed.—Except as otherwise provided by law, no freight motor vehicle shall be operated over, on, or upon the public highways of this state where the total weight on a single axle, or any group of axles, exceeds the weight limitations set forth below in subsections A, B, C, D, E, and F.

A. No axle shall carry a load in excess of eighteen thousand (18,000) pounds, provided that no front axle on truck tractors as defined in § 59-104 shall carry a load in excess of twelve thousand (12,000) pounds.

Axle combinations and fifth wheel placement on the tractor shall insure equal weight distribution on weight carrying axle combinations and such axle combinations shall be equipped with brakes having power motivation.

An axle load as set out herein is defined as the total load transmitted to the road by all wheels whose centers may be included between two (2) parallel transverse vertical planes, forty (40) inches apart, extending across the full width of the vehicle.

B. The total gross weight concentrated on the highway surface from any tandem axle group shall not exceed thirty-two thousand (32,000) pounds for each such tandem axle group. A "tandem axle group" is defined to be two (2) or more axles spaced forty (40) inches or more apart from center to center having at least one (1) common point of weight suspension.

C. No freight motor vehicle, truck tractor, trailer or semitrailer, nor combinations of such vehicles, shall be operated over, on, or upon the public highways of this state where the total gross weight of such vehicle, or combination thereof including the load thereon, exceeds seventy-three thousand two hundred eighty (73,280) pounds, except such vehicles, or combinations thereof, operate under special permits now authorized by law; provided, that wherever a maximum permissive gross weight of seventy-three thousand two hundred eighty (73,280) pounds

or a length of fifty (50) feet or a height of thirteen and one-half (13½) feet is authorized for any vehicle or combination of vehicles, it is the legislative intent that the prescribed weight, height and length limit shall be strictly enforced and it shall be unlawful for any state, county, or municipal officer to allow or permit any additional weight, height or length by way of tolerance or otherwise, except that the commissioner of highways may issue special permits as provided by § 59-1111.

D. A freight motor vehicle, as used in this section, includes both the tractor or truck and the trailer, semitrailer or trailers, if any, and the weight of any such combination shall not exceed the maximum fixed herein; provided, however, that no freight motor vehicle with motive power shall haul more than one (1) vehicle.

E. No freight motor vehicle shall haul a trailer on any highway of this state when such trailer (including its load) weighs more than thirty-five hundred (3,500) pounds, and the hauling of a trailer which, including its load, weighs more than thirty-five hundred (3,500) pounds is hereby prohibited and declared unlawful. For the purposes hereof a trailer is defined as a vehicle without motive power designed or used for carrying freight or property wholly on its own structure, provided, however, that it shall not be unlawful for any motor vehicle subject to §§ 59-1107-59-1112 to have a semitrailer, which, for the purposes hereof, is defined as a vehicle for the carrying of property or freight and so designed that some part of the weight of such semitrailer or its load rests upon or is carried by the motor vehicle to which it is attached. Provided, that

the hauling of a trailer (to the extent herein permitted) or a semitrailer, shall be subject to the further provisions hereof. Provided, further, that said §§ 59-1107-59-1112 are not intended to prohibit the movements of spools carrying wire or cable, when used for construction or repair purposes. Provided, further, that the weight limitation respecting trailers shall not be applicable to implements designed to distribute fertilizer while such vehicles are being drawn by a freight motor vehicle between the plant and the farm.

59-1111. Special permits for moving vehicles of excess weight or size—Reduction of weight and size regulations—Signs indicating.—The commissioner of highways shall have the authority to grant special permits for the movements of freight motor vehicles carrying gross weights in excess of the gross weights set forth in § 59-1109 or dimensions in excess of the dimensions set forth in §§ 59-1107, 59-1108. The commissioner of highways shall have the authority to reduce the maximum gross weight of freight motor vehicles operating over lateral highways and secondary roads where through weakness of structure in either the surface of or the bridges over such lateral highways or secondary roads, the maximum loads provided by law, in the opinion of the commissioner, injure or damage such roads or bridges. The appropriate county officials shall have the same authority as to county roads.

The commissioner of highways shall at each bridge and on each lateral highway or secondary road post signs indicating the maximum gross weight permitted thereon; and it shall be unlawful to operate any freight motor vehicle thereon with a gross weight

in excess of such posted weight limit and any person violating said rules and regulations of the commissioner of highways upon such secondary or lateral roads shall be punished as in case of the commission of a misdemeanor.

The commissioner of safety shall, with the approval of the governor, provide means and prescribe rules and regulations governing the weighing of freight motor vehicles as herein defined, which rules and regulations may make allowances for differentials in weight due to weather conditions.

The commissioner of highways shall prescribe by orders of general application, rules and regulations for the issuance and/or renewal (without cost to the applicant) of such special permits for stated periods not exceeding one (1) year, for the transportation of such oversize, overweight, or overlength articles or commodities as cannot be reasonably dismantled or conveniently transported otherwise, and for the operation of such super-heavy or overweight motor trucks, semitrailers and trailers, whose gross weight, including load, height, width, or length, may exceed the limits prescribed herein, or which in other respects fail to comply with the requirements of the Code, as may be reasonably necessary for the transportation of such oversize, overweight, or overlength articles or commodities as cannot be reasonably dismantled or conveniently transported otherwise.

Said permit shall be issued and may be renewed only upon such terms and conditions, in the interest of public safety and the preservation of the highways, as are prescribed in said general rules and regulations promulgated by such orders of the commissioner.

Said rules and regulations so prescribed by the commissioner shall require, as a condition of the issuance of such permit, that the applicant shall agree to and give bond with surety (unless the applicant shall by sworn statement furnish satisfactory proof of his solvency to the authority issuing the permit) to indemnify the state and/or counties thereof, against damages to roads, or bridges, resulting from the use thereof by the applicant. Each such permit and bond, if the commissioner so authorizes, may cover more than one (1) motor vehicle operated by the same applicant. The operation of motor trucks, tractors, semitrailers or trailers, in accordance with the terms of any such permit shall not constitute a violation of §§ 59-1107-59-1112, provided the operator thereof shall have said permit, or a copy thereof, authenticated as the commissioner may require, in his possession. The operation of any motor truck, semitrailer or trailer, in violation of the terms of such permit, shall constitute a violation of law punishable under § 59-1112.

The authority issuing such permits shall have the right to revoke the same at any time in the event in the use of the same the holder of such permit shall abuse the privilege given thereby, or otherwise make wrongful use of the same. The authorized county authorities (as well as the commissioner) may issue permits, but always consistently with said rules and regulations, prescribed by the commissioner, for movements over any and all roads (except city streets) within the limits of the county for which they are acting.

59-1112. Penalty for violation of §§ 59-1107-59-1111—Injunction proceedings—Disposition of fines,

penalties and forfeitures.—Each violation of §§ 59-1107-59-1109 and each violation of restrictions on the maximum gross weight of freight motor vehicles duly adopted and promulgated by the commissioner of highways, under § 59-1111, and each violation of rules and regulations duly adopted and promulgated by the commissioner of safety under said section, shall be a misdemeanor and, upon conviction thereof, a fine of not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500) shall be assessed. Any taxpayers of the state shall have the right by injunction proceedings to enjoin any actual or threatened use of any highway prohibited by said sections. All fines, penalties and forfeitures of bonds imposed or collected under this section shall be paid over within ten (10) days after receipt thereof to the department of safety with a statement accompanying the same, setting forth the action or proceedings in which such moneys were collected, the name and residence of the defendant, the nature of the offense, and fine, penalty, or forfeiture imposed. Provided, however, where said fines, penalties and forfeitures are imposed because of arrests made by employees of the department of revenue, the same shall be paid over immediately to the commissioner of revenue, who is authorized to take all steps necessary to enforce the collection and prompt return thereof. Such fines, penalties and forfeitures when so collected by either the department of safety or the commissioner of revenue shall be deposited with the treasurer of the state and shall become a part of the general funds of the state.

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